

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

DIVISION I

CA 06-393

December 20, 2006

NABCO AND RISK MANAGEMENT
SERVICES

APPELLANTS

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F406774]

V.

DAVID R. WILLIAMS

APPELLEE

REVERSED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

In this case, the Workers' Compensation Commission affirmed and adopted the decision of the administrative law judge that David Williams was entitled to additional medical benefits but that Williams was not entitled to further temporary-total disability benefits. Nabco appeals, arguing that there is no substantial evidence to support Williams' entitlement to further medical benefits. Williams has cross-appealed, arguing that there is no substantial evidence to support the finding that he was no longer temporarily and totally disabled. We reverse on direct appeal and affirm on cross-appeal.

Williams had been working for Nabco for two years as a pipe welder when on June 16, 2004, he injured his back while lifting a pipe. He said that he felt his back "pop" and

that he was in a great deal of pain. The next day, Williams was treated by Dr. Lackey G. Moody, his family physician, who ordered an MRI. The MRI study of June 21 revealed a minimal central disc protrusion at the L4-L5 level, that produced a slight deformity along the ventral margin of the thecal sac. However, no spinal stenosis or foraminal stenosis was seen. At L5-S1, there was a small left paracentral disc protrusion producing effacement of the epidural fat but without mass effect upon the thecal sac or nerve roots. On June 23, Dr. Moody noted that Williams continued to experience pain that was radiating into his left leg. He released Williams to return to light duty on that date. However, on June 30 Dr. Moody took appellant off work until July 14, when Williams was to be seen by Dr. Scott Schlesinger, a neurosurgeon.

On July 14, Dr. Schlesinger opined that, based on his examination and a review of the MRI, Williams' back and leg pain were probably coming from an aggravation of lumbar degenerative disc disease with very minimal disc protrusion at L5-S1. He believed that Williams would benefit from one to three epidural steroid injections, and he ordered Williams to continue with physical therapy and to remain off work for two to four weeks. Dr. Schlesinger did not feel that there was a need for any form of surgery.

Williams received an epidural steroid injection on July 22. He telephoned Dr. Schlesinger on August 4 to say that he had gotten no relief from the injection. On that date, Dr. Schlesinger reported that there was nothing further that he could do and that Williams had reached maximum medical improvement. He released Williams from his care, noting

that there was nothing for which to give a disability rating.

Williams returned to Dr. Moody on several occasions continuing to complain of pain and to obtain refills for his pain medications. Williams then obtained approval from the Commission to change his physician to Dr. Thomas Ward, a pain specialist.

From Williams' visit on October 13, Dr. Ward noted the results of the previous MRI and that Oxycodone and Diazepam had not relieved Williams' pain. Dr. Ward observed that Williams displayed a significant postural defect that consisted of a "tilting and leaning type posture to the left of the lower extremity, with a compensatory upper right serpentine type shift of his shoulder and his upper back into a forward and right sided lean." Dr. Ward referred to the compensatory postural abnormality as distonia and said that it had become part of Williams' problem. He recommended Marcaine chemo-denervation injections for the correction of this condition.

On October 21, Williams underwent bilateral Marcaine chemo-denervation injections. Dr. Ward reported on that date:

Post Injection Findings: Mr. Williams had no benefit from his injections on this date. There has not been a single instance in which injections carried out of this variety has not assisted in a patient's pain. It can be therefore assumed that there can be no organic cause of his pain, and in fact after further observation the patient noticed dramatic pain behavior which correlated highly with positive Waddell signs.

Conclusion: No organically identified injury and/or condition in which symptoms in the variety of injuries complained of by the patient can be substantiated. He is at maximum medical improvement. I do not have any explanation for her [sic]

patient's complaints of pain, however, I can categorically indicate that there are no findings present on this date to substantiate his claim. He has been released back to work full duty.

After Dr. Ward's release, Williams returned to Dr. Moody on November 1. Williams reported to Dr. Moody that he was not helped by Dr. Ward and that Ward had released him to full duty. Dr. Moody ordered a bone scan, which did not indicate any abnormality in the lumbar spine.

Williams next presented to Dr. Patrick Chan, a neurosurgeon, on December 13 and January 3, 2005. Williams continued to complain of lower-back pain that radiated down his left leg. Dr. Chan ordered another MRI.¹ On January 3, Dr. Chan wrote as his diagnosis and recommendation that Williams had persistent left leg pain secondary to a left L5-S1 herniated nucleus pulposus; that Williams had failed nonoperative treatment; and that Williams would most likely need left L5-S1 decompression.

Nabco argued that it was not required to pay for the treatment rendered by Drs. Moody and Chan after Williams had obtained the one-time change of physician to Dr. Ward. Nabco also argued that Williams's entitlement to temporary-total benefits ended on October 21, when Dr. Ward stated that Williams had reached maximum medical improvement and that he could return to work. Williams argued that based on Dr. Chan's notes he was entitled to further reasonable and necessary medical treatment and that he remained in his healing period.

¹ The record does not contain the results of this MRI.

In affirming and adopting the administrative law judge's opinion, the Commission determined that Nabco was responsible for the unauthorized treatment given by Drs. Moody and Chan. The Commission found, however, that Williams was not entitled to further temporary-total disability benefits.

The Commission found that Nabco was obligated to pay for the treatment provided by Drs. Moody and Chan, even after the approved change of physician to Dr. Ward, because Nabco "controverted" Williams' claim for further medical benefits. Nabco argues for reversal of that decision that it did not "controvert" Williams' request for further treatment because he sought the treatment on his own without contacting it beforehand. We agree.

Williams had obtained a one-time change of physician as authorized by Ark. Code Ann. § 11-9-514(3)(A)(iii) (Repl. 2002). Subsection (b) of this statute provides that treatment or services furnished or prescribed by any physician other than the ones selected in accordance with the statute, except emergency treatment, shall be at the claimant's expense. In ruling that Nabco was responsible for the treatment rendered by Drs. Moody and Chan after the one-time change of physician, the Commission relied on our decision in *Sanyo Mfg. Corp. v. Farrell*, 16 Ark. App. 59, 696 S.W.2d 779 (1985). In that case, the claimant suffered a compensable back injury, and after being treated by several doctors selected by the employer, she obtained approval from the Commission to a change of physician to Dr. Rodney Feild. After seeing the claimant on five or six occasions, Dr. Feild

released her to return to work, and he wrote a letter to the employer stating that there was no anatomical foundation for her continued disability and that she should be replaced if she did not return to work. It was his impression that she was malingering.

The claimant returned to work but she continued to have pain in her legs. She saw the company doctor and then the company nurse, who told her that she could not return to Dr. Feild and that she would have to consult another doctor at her own expense. The claimant saw another physician, Dr. Gary Kellett, who after testing diagnosed a bulging disc and treated her with injections, which resolved her problem. We affirmed the Commission's decision requiring the employer to pay for the treatment by Dr. Kellett.

We think that the decision in *Sanyo, id.*, is distinguishable. There, the employer manifestly refused to provide further medical treatment. Here, Nabco was not consulted nor was any request made by Williams for further medical treatment. He did not return to Dr. Ward, his authorized treating physician, nor did he ask Dr. Ward for a referral to another physician. The Commission found that Nabco "controverted" Williams' entitlement to further medical treatment because "the respondents were not going to pay for any more medical after Dr. Ward's release on October 21, 2004." This finding was based on a statement made by Nabco's attorney at the hearing. However, this statement was made in the context of arguing that the treatment by Drs. Moody and Chan was not authorized, nor reasonably necessary. On these facts, we cannot say that the employer is liable for unauthorized treatment simply because it takes the position, consistent with the

law, that it is not responsible for treatment rendered by an unauthorized physician.

On cross-appeal, Williams argues that substantial evidence does not support the Commission's decision that he is not entitled to further temporary-total benefits. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Construction Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve the condition, the healing period has ended. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The determination of when the healing period has ended is a factual determination for the Commission, and will be affirmed on appeal if supported by substantial evidence. *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

Here, the Commission determined that Williams was not entitled to further temporary total disability benefits past October 21, 2004, when he was released by Dr.

Ward. Both Drs. Ward and Schlesinger opined that Williams had reached maximum medical improvement, and the Commission gave greater credence to their opinions than to the report of Dr. Chan. It cannot be said that there is no substantial evidence to support the Commission's decision.

Reversed on direct appeal; affirmed on cross-appeal.

GLOVER and VAUGHT, JJ., agree.